

DIVISION IV

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
JUDGE KAREN R. BAKER

CACR05-00963

JUNE 14, 2006

JIMMY DOYLE BUMGARDNER

APPELLANT

v.

APPEAL FROM THE GRANT COUNTY
CIRCUIT COURT
[CR2004-23-2]

STATE OF ARKANSAS

HONORABLE PHILLIP H. SHIRRON,
CIRCUIT JUDGE

APPELLEE

AFFIRMED

A Grant County jury convicted appellant Jimmy Doyle Bumgardner of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and over-possession of ephedrine/pseudoephedrine. He challenges his convictions asserting three points of error: (1) The trial court erred in denying appellant's motion to suppress; (2) The trial court erred in denying appellant's motion for directed verdict; (3) The trial court erred in that the judgment and commitment order does not reflect the trial court's judgment at trial. We find no error and affirm.

Deputy Roberts of Grant County described the progression of events that led to appellant's arrest. He explained that on February 21, 2004, at approximately 9:41 p.m., he noticed a truck parked on the side of the road and stopped to check on the welfare of the occupant. When he walked up to the truck, he observed appellant inside it, talking on a cell phone. During his initial contact with appellant, Roberts concluded that appellant was "under the influence of something." Roberts reached this conclusion based upon appellant's "nervous and fidgety" behavior and the appearance of appellant's "very dilated" eyes. Roberts eventually asked appellant if he would exit the vehicle

and empty his pockets on the hood of appellant's truck. Appellant agreed and, when he started removing the contents of his pockets, a white straw-type object that contained a powdery residue attracted Roberts's attention. Roberts then directed appellant to place his hands on the vehicle. Appellant responded by fleeing, but he was apprehended after a short foot chase and struggle. Roberts placed appellant under arrest, and with a cursory search of appellant incident to his arrest, Roberts found a baggie of white powder he believed to be an illegal substance. A search of appellant's truck revealed a set of scales and two large bags containing a white powdery substance. After Roberts transported appellant to the county detention center, he conducted a routine search of the backseat of his patrol unit where he found another bag containing a white powdery substance stuffed under the seat.

Testimony addressing the contents and weights of the bags was presented by Brent Cole, an agent with Group 6 Narcotics, and Nick Dawson, a drug chemist at the Arkansas State Crime Laboratory. Cole explained that he field tested the small baggies and each had a positive reaction for methamphetamine. One larger bag field tested positive for ephedrine and the other larger bag tested negative for methamphetamine and ephedrine. Other evidence Cole described receiving from Roberts included digital scales and two strips of aluminum foil containing burn residue. Dawson detailed the chemical analysis performed on each individual package. He testified that item E-1 contained .8005 grams of 95.2 percent methamphetamine while E-2 contained .6272 grams of 92.7 percent methamphetamine. He further testified that E-3 contained 10.7496 grams of 96.6 percent pure pseudoephedrine hydrochloride, and E-4 contained 116.9 grams of dimethyl sulfone, a cutting agent for methamphetamine. Dawson also stated his belief that the contents of the two smaller packages came from two different batches because they were different in color.

While appellant presents the challenge to the sufficiency of the evidence as his second point on appeal, preservation of his freedom from double jeopardy requires us to examine the sufficiency argument before addressing trial errors. *Nelson v. State*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 16, 2006). We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Cluck v. State*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 6, 2006). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Appellant argues that the jury could not have convicted him of these charges without resorting to speculation and conjecture because the State failed to prove that he possessed one gram or more of methamphetamine. His argument implies that one gram of the contraband is the necessary minimum amount to reach the presumptive amount for intent to deliver. However, the presumptive amount for a stimulant drug, such as methamphetamine, is 200 milligrams. *See Rabb v. State*, 72 Ark. App. 396, 400, 39 S.W.3d 11, 14 n.1 (2001)(stating that, under Ark. Code Ann. § 5-64-401(d), possession of more than two hundred milligrams of methamphetamine gives rise to a presumption of intent to deliver). He also asserts that the fact that there were two separate bags of contraband, one in the car and one on appellant, from two different batches of methamphetamine, is insufficient to support the jury's verdict.

While it is not clear from the testimony exactly which of the two baggies containing methamphetamine was found under the seat of the patrol car and which was found on appellant, the amount in each package alone was sufficient to prove the presumptive amount. In addition, Roberts

testified that he always searched the backseat of his patrol unit prior and subsequent to transporting prisoners. This testimony raised the circumstantial inference that appellant had hidden the one baggie of methamphetamine in the seat during his transportation. Circumstantial evidence can provide the basis to support a conviction if it is consistent with defendant's guilt and inconsistent with any other reasonable conclusion, and such a determination is a question of fact for the factfinder to determine. *Von Holt v. State*, 85 Ark. App. 308, 313-14, 151 S.W.3d 1, 4 (2004). Furthermore, no argument or evidence was presented to show that it would be unreasonable to conclude that a dealer would be selling methamphetamine from two different batches.

Furthermore, the State also adduced testimony that appellant was in possession of an illegal quantity of ephedrine, a key ingredient of methamphetamine, as well as a digital scale, a large quantity of a cutting agent, and strips of aluminum foil with burn residue. In *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997), the supreme court upheld an appellant's conviction for possession with intent to deliver marijuana where less than the presumptive amount was found in the appellant's possession, but other evidence of intent to deliver was present with the marijuana, including a canvas bag that smelled of marijuana and that contained computerized weighing scales.

The evidence in this case, direct and circumstantial, is of sufficient force to compel with reasonable and material certainty the conclusion that appellant possessed the methamphetamine with the intent to deliver. *See Barnett v. State*, 68 Ark. App. 38, 3 S.W.3d 344 (1999). Therefore, we affirm on that point.

Appellant also argues that the trial court erred in denying his motion to suppress. In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due

weight to inferences drawn by the trial court. *See Davis v. State*, 351 Ark. 406, 413, 94 S.W.3d 892, 896 (2003). This court defers to the credibility determinations made by the trial judge when weighing and resolving the facts and circumstances in the matter. *Id.*

While appellant advances arguments as to whether Roberts had probable cause to stop appellant's truck, Roberts did not stop appellant's vehicle. The truck was parked on the side of a public roadway, and an officer cannot stop a parked vehicle. *See Freeman v. State*, 37 Ark. App. 81, 824 S.W.2d 403 (1992). Additionally, the mere approach of a police officer to a car parked in a public place does not constitute a seizure. *See Harmon v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997).

In *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990), our supreme court affirmed the trial court's denial of a motion to suppress where an officer had noticed Thompson's car parked adjacent to the parking lot of an apartment complex at 1:30 a.m. The officer testified that he approached the car to determine if something might be wrong with the driver or whether "there might be something going on that shouldn't be." *Id.* at 408, 797 S.W.2d at 451. The court held that the officer's encounter with Thompson was governed by Ark. R. Crim. P. 2.2.(a) which provided:

A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

Our supreme court held that the officer acted properly in approaching the car to determine if there was a problem after he noticed the car parked in the early morning hours and that there was no seizure until the officer developed a reasonable suspicion of possible DWI as he talked to Thompson. *Id.* at 410, 797 S.W.2d at 452. *See also Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988) (holding that officer acted properly under Rule 2.2(a) when he approached a car to request

identification, smelled marijuana and saw accused stuff something into his pants, and describing these facts as a logical progression of events that resulted in probable cause for arrest and search of car).

Similarly, Roberts acted properly in approaching appellant's truck to determine if there was problem after he noticed the truck parked on the side of the road. Following the logical progression of events, the appearance of appellant's eyes and appellant's manner led him to suspect that appellant might be under the influence of drugs, and subsequently, in a position where he would be operating a vehicle.

Based upon that suspicion, Roberts properly requested appellant to exit his vehicle and empty the contents of his pockets. While Roberts had reasonable suspicion to detain appellant at that time, neither probable cause nor reasonable suspicion is necessary for an officer to make a request for a consent to search. *See Howe v. State*, 72 Ark. App. 466, 470, 39 S.W.3d 467, 470 (2001). To the extent that appellant testified that he agreed to exit the vehicle but actually refused to empty his pockets, matters of credibility are within the fact-finder's province. *See Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

Roberts's discovery of the contraband and appellant's decision to flee led to his arrest. Where, as here, an officer has probable cause to make an arrest pursuant to Ark. R. Crim. P. 4.1, he may validly conduct a search incident to arrest of the person and the area within his immediate control. *Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004). Therefore, Roberts's actions were appropriate, and the trial court did not err in denying appellant's motion to suppress.

Nor did the trial court err in entering a judgment and commitment order that ran the sentences consecutively. The jury verdict in this case recommended sixty years in the Department of Correction and a fine of \$5000 for possessing methamphetamine with intent to deliver; twelve

years in the Department of Correction and fined \$5000 for possessing ephedrine or pseudoephedrine; and twenty years in the Department of Correction and a fine of \$5000 for possessing drug paraphernalia. From the bench, the trial court ruled that the sentences would be served concurrently; however, the judgment and commitment order signed by the trial judge reflects that all sentences are to run consecutively.

Appellant argues that the record is void of any findings contrary to the trial court's statements from the bench that the sentences were to run concurrently; and therefore, the judgment and commitment order were erroneously entered. Appellant's argument implies that the sentence is illegal.

Arkansas Code Annotated section 5-5-403 (Repl. 2006) provides that when multiple sentences are imposed, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively. In *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003), our supreme court held that judgment and commitment orders are effective upon the entry of record in accordance with Administrative Order No. 2. Therefore, the trial court in this case was within its authority to modify the sentence announced in open court prior to entry of the written judgment, and no error occurred. *See id.*

Affirmed.

VAUGHT and CRABTREE, JJ., agree.